(3)

No. 06-567

Supreme Court, U.S.
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In the Supreme Court of the United States

PAUL JUNG, M.D., *ET AL.*

Petitioners,

v.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF SUPPORTING PETITION FOR A WRIT OF CERTIORARI

SHERMAN MAREK
Attorney at Law
1055 W. Bryn Mawr Ave.
Chicago, IL 60660
(312) 805-0244

C. BARRY MONTGOMERY
DEBORAH H. BORNSTEIN
Williams Montgomery & John, Ltd.
20 N. Wacker Dr., Ste. 2100
Chicago, IL 60606
(312) 443-3200

MICHAEL FREED*
JEAN JANES
Much Shelist Freed Denenberg Ament & Rubenstein, P.C.
191 N. Wacker Dr., Ste. 1800
Chicago, IL 60606
(312) 521-2000

* *Counsel of Record*
Counsel for Petitioners

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Petitioners Paul Jung, M.D.; Denise Greene, M.D.; and Luis Llerena, M.D. ("Residents") submit this reply brief pursuant to Supreme Court Rule 15.6 to address new points raised by Respondents in their Brief in Opposition ("Opp.").

1. Respondents Do Not Dispute Splits Of Circuit Authority On Important Procedural Issues. Respondents' brief primarily discusses the correctness of the ruling in this case, but that is largely an issue for another day. The issue today is whether there are important federal questions and splits of circuit authority that warrant the review of this Court, and the answer is "yes." Respondents suggest that this Court wait for some undefined "better vehicle to address any certiorari-worthy questions. . . ." Opp. 19, but any delay is a disservice to courts and parties nationwide and unfair to the Residents here.

It is, of course, important to preserve district court discretion on certain procedural matters, Opp. 9, 10, 18-20, 22, 24-27, but Respondents overplay that need and fail to recognize the equal importance of parties knowing exactly what is required of them under the federal procedural rules, and that is impossible without clearly articulated, uniform, and consistently applied standards. Historically, this Court has been interested in uniform application of federal procedural rules in particular. *See Hanna v. Plumer*, 380 U.S. 460, 472 (1965); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958).

Respondents do not dispute the circuit split on the standard for dismissal of a complaint with prejudice, specifically that (a) ten circuits allow such dismissal only where no amended complaint could be offered that would meet the Rule 15(a) standard for amendment, and (b) the D.C. and Ninth Circuits also allow dismissal with prejudice where the allegations of any amended complaint would be

"inconsistent" with those of the preceding complaint. *Compare* Pet. 13-20, *with* Opp. 18-21 (ignoring all 21 D.C. and Ninth Circuit decisions cited by the Residents). This troublesome split exists whether or not this Court's ruling in *Foman v. Davis*, 371 U.S. 178 (1962), is the basis for the majority rule, Opp. 19, although *Foman* clearly is the basis. Importantly, Respondents never identify the standard for dismissal with prejudice, Opp. 18-21, and may believe that to be without a standard is to be without a conflict, but it is also to be in need of a standard.

Respondents similarly ignore the circuit split on the standard for post-judgment repleading of the complaint where it has been dismissed *on the pleadings*, specifically that (a) eight circuits apply the liberal standard of Rule 15(a), and (b) four circuits, including the D.C. Circuit, apply the "more stringent" standard of Rule 59(e). *Compare* Pet. 20-26, *with* Opp. 23-27. Respondents not only fail to identify any standard, but say more directly that there is *none*. Opp. 24 ("the circuits may use different words," but each allows "considerable discretion"). Once again, to be without a standard is only to be in need of one, it does not defeat the need for this Court's guidance.

Respondents' cited authorities do not cure the circuit split. The split remains even if the D.C. Circuit on two occasions may have reached a more liberal result than usual under its stringent Rule 59(e) standard. Opp. 24, citing *Ciralsky v. CIA*, 355 F.3d 661, 673-74 (D.C. Cir. 2004); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996). Likewise, the circuit split exists and should be resolved even if the Sixth Circuit on one occasion may have reached a more conservative result than usual under its liberal Rule 15(a) standard. Opp. 24, citing *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002). The split is also not obviated by four courts considering the time of dismissal in assessing

the "undue delay" factor of their Rule 15(a) standard. Opp. 25, citing *Palmer v. Champion Mortgage*, 465 F.3d 24, 30-31 (1st Cir. 2006); *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 280 (3d Cir. 2004); *Schiller v. Physicians Res. Group Inc.*, 342 F.3d 563, 569 (5th Cir. 2003); and *McWhorter*, 290 F.3d at 800. Furthermore, *Laber v. Harvey*, 438 F.3d 404, 432-33 (4th Cir. 2004), and *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000), involve repleading of a complaint after summary judgment, not after dismissal *on the pleadings*, which is the subject of this petition. Opp. 24. *See* Pet. i, 22.

Indeed, Respondents' brief does more to *demonstrate* the need for this Court's guidance than to refute it. Respondents jump out of the frying pan and into the fire by drawing a parallel between this case and the Rule 15(a) "undue delay" cases, Opp. 25, because the circuits are split on how to define that term. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205-06 n.15 (10th Cir. 2006) (discussing split). Respondents contend that this split is limited to "the pre-judgment context," Opp. 24 n.25, but that unsatisfying distinction begs the fundamental questions of this petition, and is also wrong. *See, e.g., Benzon v. Morgan Stanley Distrib., Inc.*, 420 F.3d 598, 613 (6th Cir. 2005) (applying Rule 15(a) standard in post-judgment context and citing *Foman v. Davis*, 371 U.S. 178 (1962)).

Respondents similarly illustrate more conflict than harmony among the circuits by arguing that a district court may deny leave to replead the complaint if a plaintiff does not ask for it, a question on which there is also a split of circuit authority. Opp. 20-21, 24-26. Respondents cite cases from the First, Second, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits. Opp. 20 n.19. But other circuits, including the D.C. Circuit recently, disagree, and do not allow dismissal with prejudice simply for lack of a pre-dismissal

request to amend. *See, e.g., Belizan v. Hershon,* 434 F.3d 579, 584 (D.C. Cir. 2006); *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). Similarly, this Court in *Foman* reversed the district court for denying leave to amend even though the plaintiff had not moved to amend pre-judgment. 371 U.S. at 182.

Respondents also harm their cause by suggesting that courts misinterpret and misapply this Court's seminal ruling in *Foman*, 371 U.S. at 182, which established the modern standard for leave to amend. Respondents argue that the *Foman* standard does not apply to dismissals with prejudice, Opp. 19, but several courts disagree as reflected in cases that Respondents cite on the very next page of their brief. Opp. 20 n.19, citing *James Cape & Sons, Co. v. PCC Constr. Co.*, 453 F.3d 396, 400-01 (7th Cir. 2006) (reviewing dismissal with prejudice and citing *Foman* in that regard); *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698 (6th Cir. 2004) (same). Few courts likely share Respondents' reading of *Foman* that "a district court abuses its discretion [only] when it denies leave to amend without explaining the basis for its action," Opp. 26, especially because *Foman* specifically lists the preconditions of undue delay, bad faith or dilatory motive, repeated failure to cure by amendment, undue prejudice, and futility. 371 U.S. at 182.

2. The Savings Clause Applies Because The Residents Pleaded A Price-Fixing Claim. Respondents argue that the Residents' price-fixing claims are not "traditional," Opp. 2 (appearing, incorrectly, to quote the Residents themselves), and thus not preserved by the savings clause, Opp. 12. The Residents' claim clearly is a price-fixing claim. Respondents themselves admit that it "allege[s] a long-standing conspiracy that had the effect of depressing the level of stipends received by medical

residents . . . ." Opp. 2. Likewise, the district court ruled that the Residents "alleged a common agreement . . . that has the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation . . . ." Pet. App. 150-51.

Respondents and the district court precisely describe price-fixing. "The Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" *U.S. v. Jimenez Recio*, 537 U.S. 270, 274 (2003). "[R]aising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). "[I]t [is not] important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible . . . They are fixed because they are agreed upon." *Id.* Respondents futilely attempt to re-label the Residents' claims based on the *mechanisms* used, Opp. 2-3; 12-13, but "[a]s we have indicated, the machinery employed by a combination for price-fixing is immaterial." *Socony-Vacuum*, 310 U.S. at 223.

The savings clause preserves claims alleging any agreement to "fix the amount" of resident wages. Section 207(b)(3). "Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Beck v. Prupis*, 529 U.S. 494, 501 (2000). Respondents wrongly interpret "fix the amount" narrowly, and wrongly contend that the savings clause "does not preserve all antitrust claims that allege some *impact* on resident stipends . . . ." Opp. 12 (emphasis in original). Under *Beck* and *Socony-Vacuum*, the savings clause certainly encompasses the Residents' claim, which is a price-fixing claim. Respondents are backpedaling now, but they

told Congress that the Match had no impact on resident compensation and the savings clause holds them to it.

3. Neither Lower Court Here Decided Rule 15(a) Issues, Conflicting With The Majority Circuit Standards. Respondents incorrectly contend that the district court denied the Residents' post-judgment motion not only under Rule 59(e), but "in the alternative" under Rule 15(a). Opp. 8. To the contrary, the court stated that Rule 15(a) issues could not be reached "unless the plaintiff first satisfies Rule 59(e)'s more stringent standard." Pet. App. 45. It found the Rule 59(e) standard unsatisfied, *id.* at 45, solely because the Residents did not move to amend their complaint pre-dismissal. *Id.* at 46. "Plaintiffs' [Rule 15(a)] motion to amend their complaint therefore is moot." *Id.* at 47. For its part, the D.C. Circuit expressly ruled that it "need not reach the Rule 15(a) issue." Pet. App. 7. The absence of any Rule 15(a) ruling by either lower court puts them in direct conflict with the majority of circuits, which hold that both dismissal with prejudice and post-judgment leave to replead are *controlled* by Rule 15(a) issues.

The district court's *dicta* in a single paragraph regarding "problems," *dicta* not cited or endorsed by the D.C. Circuit, falls far short of any reasonable futility analysis of the amended complaint, Pet. App. 48-49, as demonstrated by the scores of pages that were necessary to decide those same issues earlier when the district court upheld the original claim. Pet. App. 55-87, 115-149.

4. The Residents' Post-Judgment Motion For Leave To Amend Was Timely. Respondents wrongly assert that the Residents' Rule 59(e) motion was untimely. Opp. 22-23. As a threshold matter, the lower courts did not "decline to reach" Respondents' argument, Opp. 23; they necessarily rejected it by deciding the merits of the motion.

The time limit is jurisdictional and untimeliness is not only "an absolute bar to any relief," Opp. 23, but also an absolute bar to "review[ing] the judgment" at all. *Derrington-Bey v. District of Columbia Dep't of Corrections*, 39 F.3d 1224, 1226 (D.C. Cir. 1994).

Moreover, Respondents admit that the Residents filed their motion to alter or amend judgment within the ten-day period, Opp. 7, and that act conferred jurisdiction on the district court to alter or amend its judgment on any ground. *See E.E.O.C. v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. of the U.S. and Canada, Local No. 120*, 235 F.3d 244, 250 (6th Cir. 2000) ("a judge may enlarge the issues to be considered in acting on a timely motion under Rule 59(e)," quotations omitted). It is irrelevant that the opening brief focused on the manifest injustice of claim preclusion via the statute of limitations while the reply focused on it via *res judicata*, and the two are not "entirely different." Opp. 22.

5. Respondents Overplay Their Incorrect "Waiver" Theme. Respondents energetically remind the Court that the Residents "rested on" their original claim, and argue that this waived any ability to amend after it was dismissed. Opp. 4-5, 7, 9, 10, 19, 20, 21, 22, 26, 27.[1] Respondents cite only cases upholding dismissal with prejudice where a plaintiff *never* moved to amend, either pre- or post-judgment, and thus improperly raised the issue for the first time on appeal, Opp. 20 n.19. Here, the Residents moved to amend post-judgment, as they were invited to do no less than three times in Respondents' briefs on the motion to dismiss.

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[1] Another aspect to this tempest in a teapot, attached hereto as R-App. 1-7, is the entirely benign joint submission to the district court referenced by Respondents. Opp. 5 n.3.

Respondents' lack of authority supporting their waiver theory is unsurprising given that, when they filed their motion to dismiss, nothing in the federal procedural rules limited the Residents' choices only to (a) the Scylla of effectively conceding Respondents' motion to dismiss by abandoning the original claim and asserting a scaled-down claim without any test of the new Match legislation, or (b) the Charybdis of opposing the motion to dismiss at the risk of losing their entire action and any ability to assert a scaled-down claim omitting Match allegations. "Resting on" or "standing on" a complaint is a concept wholly inapplicable here: after dismissal *without prejudice*, a plaintiff may elect to formally decline to amend ("stand on") a complaint in order to obtain a final judgment and proceed to appeal. *See, e.g., Jung v. K. & D. Mining Co.*, 356 U.S. 335, 336 (1958).

Contrary to Respondents' suggestion, a pre-dismissal motion to amend would not have mooted the Respondents' pending motion to dismiss and would not have saved the district court any effort. The amended complaint did not *abandon* the original claim, but pleaded two claims, *see* Pet. App. 228-31, one being the original claim and the other being a new claim virtually identical to the original claim but for omitting the Match as a plus factor. *See* amended complaint, Pet. App. 169 ("Count II simply repleads the claim contained in the Plaintiffs' original complaint in order to preserve it for appeal"). The Residents' motion to amend suggested that the district court grant the motion to amend, re-dismiss the original claim and certify it for interlocutory appeal as to whether the legislation had successfully immunized the Match, and allow the parties to continue litigating the bulk of the case on the scaled-down claim during that appeal. This case had already been pending for nearly two years, yet merits discovery had not even begun. If that was the wrong approach, it did not warrant dismissal with prejudice of the entire action.

6. Denial Of Leave To Amend Unjustly Extinguishes Thousands Of Claims. Respondents erroneously contend that only the named plaintiffs in this proposed class action are deprived of their claims by the rulings here, Opp. 10, 27, a factor pivotal to manifest injustice. While the D.C. Circuit was also led to believe this, it is simply incorrect. *See* Pet. App. 7 ("Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program.")

Regrettably, thousands of additional residents are deprived of claims. If allowed in this action, the amended claim would have related back to the original filing date of May 7, 2002, and under the four-year statute of limitations all persons employed as resident physicians from May 7, 1998 forward would have had the option to exercise their legal rights if a class were certified. Fed. R. Civ. P. 15(c). However, because a new action must now be filed, the amended claim will not relate back to the original filing date, and persons who completed their residency before late 2002 (*i.e.*, four years prior to a new action's filing date) have, like the three named plaintiff Residents, unjustly lost their claims.

7. The Amended Complaint States A Proper Claim. Like the lower courts in their rulings, Respondents in their brief do not reasonably explain why the proposed amended complaint, Pet. App. 164-237, fails to state a claim within its four corners. It does, and here the procedural rules did not "work as they should" to allow it to "be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

Respectfully submitted,

Michael J. Freed (Counsel of Record)
Jean Janes
MUCH, SHELIST, FREED, DENENBERG,
AMENT & RUBENSTEIN, P.C.
191 N. Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 521-2000

Sherman Marek
LAW OFFICE OF SHERMAN MAREK
1055 W. Bryn Mawr Ave., #F-100
Chicago, IL 60660
(312) 805-0244

C. Barry Montgomery
Deborah H. Bornstein
WILLIAMS, MONTGOMERY & JOHN, LTD.
20 North Wacker Drive, Suite 2100
Chicago, IL 60606
(312) 443-3200

December 4, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., *et al.*, Plaintiffs, v. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *et al.*, Defendants.	)	Civil Action No. 02-0873 (PLF)

ORDER

(Filed May 19, 2004)

This matter is before the Court for consideration of the parties' Consent Motion to Extend Certain Briefing Deadlines. Also filed with the Court are, *inter alia,* plaintiffs' Amended Motion to Certify the Class, Defendant National Resident Matching Program's Motion to Stay Proceedings Pending Appeal; various defendants' Motion for Certification for Interlocutory Appeal; certain defendants' Motion to Stay Proceedings Pending Appeal; Plaintiffs' Motion for Leave to File First Amended Complaint; certain Defendants' Motion for Judgment on the Pleadings; and certain Defendants' Motion for Reconsideration. These motions are in various stages of briefing. The Court will grant the parties' consent motion, but also requests guidance from the parties as to the most appropriate course of action the Court should take in considering these various motions. Specifically, in view of the subject matter of the motion for reconsideration and the motion for judgment on the pleadings, is it appropriate to deal first

with those motions or first with the motions to stay and for an interlocutory appeal?

Accordingly, it is hereby

ORDERED that the Consent Motion to Extend Certain Briefing Deadlines [264-1] is GRANTED; it is

FURTHER ORDERED plaintiffs shall file their oppositions to Defendants' Motion for Judgment on the Pleadings and to Defendants' Motion for Reconsideration on or before June 4, 2004; and defendants shall file their reply briefs, if any, on or before June 18, 2004; it is

FURTHER ORDERED that defendants shall file their opposition to plaintiffs' Motion to Certify a Class on or before July 30, 2004; and it is

FURTHER ORDERED that on or before June 1, 2004, the parties shall file a joint report indicating the parties' positions with respect to the most appropriate course of action the Court should take in considering the various pending motions.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 5/17/04

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: RESIDENT PHYSICIANS ANTITRUST LITIGATION	)	Civil Action No. 02-0873 (PLF) (JMF)
This Document Relates To: All Actions	)	

PARTIES' JOINT REPORT REGARDING THE DISPOSITION OF PENDING MOTIONS

(Filed June 1, 2004)

Pursuant to the Court's May 17, 2004 Order, the parties respectfully submit this joint report indicating their positions with respect to the most appropriate course of action the Court should take in considering the various pending motions.[1]

[1] This joint report is filed on behalf of all plaintiffs and on behalf of those defendants currently before the Court, namely the Accreditation Council for Graduate Medical Education, the Administrators of the Tulane Educational Fund, the Association of American Medical Colleges, Barnes-Jewish Hospital, Baylor College of Medicine, Beth Israel Deaconess Medical Center, Beth Israel Medical Center, Boston Medical Center, Cedars-Sinai Medical Center, Cleveland Clinic Foundation, Duke University Health System, Emory University, The George Washington University, Henry Ford Health System, Massachusetts General Hospital, McGaw Medical Center of Northwestern University, MedStar Health, Inc., MedStar-Georgetown Medical Center, Inc., Mount Sinai School of Medicine of New York University, New York and Presbyterian Hospital, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, Saint Louis University, Stanford Hospital & Clinics, Strong Memorial Hospital of the University of Rochester, Thomas Jefferson University Hospital, University Hospitals of Cleveland, Inc., William Beaumont Hospital, and Yale-New Haven Hospital.

It is the parties' understanding that the following motions are currently pending before the Court:

1. Consent motion for entry of stipulated order on experts' discovery (Dkt. 201).

2. Plaintiffs' motion for class certification, as amended (Dkt. 203, 205, 238) (not fully briefed).

3. Defendants' motion to compel class discovery (Dkt. 223) (pending before Magistrate Judge Facciola).

4. Plaintiffs' motion to amend or correct order staying of class discovery (Dkt. 234) (pending before Magistrate Judge Facciola).

5. Plaintiffs' motion for protective order (Dkt. 235) (pending before Magistrate Judge Facciola).

6. NRMP's motion to stay proceedings pending appeal (Dkt. 239).

7. Certain defendants' motion for certificate of appealability (Dkt. 241).

8. Defendants' motion to stay proceedings pending appeal (Dkt. 243).

9. Plaintiffs' motion to amend the complaint (Dkt. 248).

10. Defendants' motion for judgment on the pleadings (Dkt. 259) (not fully briefed).

11. Certain defendants' motion to reconsider the Rule 12(b)(2) jurisdiction ruling (Dkt. 260) (not fully briefed).[2]

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[2] In addition, a consent motion to extend certain briefing schedules (for motions numbered 4, 10, and 11 above) is being filed herewith. All parties support the early consideration of that consent motion.

The parties are not in agreement on the most appropriate course of action. Accordingly, they set forth their respective positions below.

A. Plaintiffs' Position

Plaintiffs propose that the Court consider and rule on the motions in the following order. Among other things, plaintiffs view a ruling on their motion to amend the complaint (no. 9) as prerequisite to any rulings on defendants' dispositive motions (nos. 10 and 11) because plaintiffs' new allegations are relevant to issues raised by the latter (e.g. jurisdiction). Plaintiffs do not agree that rulings on the dispositive motions might moot the motion to amend, especially since the new allegations largely concern defendants' exchange of wage information rather than the matching program that is the subject of the legislation.

a. Plaintiffs' motion to amend the complaint (no. 9)

b. Defendants' dispositive motions based on legislation (nos. 10 and 11)

c. Motions relating to NRMP's arbitration appeal (nos. 6, 7 and 8)

d. Motions relating to class certification discovery (nos. 1, 3, 4 and 5)

e. Plaintiffs' motion for class certification (no. 2).

B. Defendants' Position

Defendants propose that the Court first address the dispositive motions based on the legislation (nos. 10 & 11).

If those motions are granted, plaintiffs' motion to amend the complaint (no. 9) could then be dismissed as moot, given that the proposed amended complaint does not raise new allegations that would bear on the applicability of the legislation. (Defendants object to plaintiffs' proposal that the motion to amend be decided first, followed immediately by consideration of the legislative motions. This is because, if the motion to amend is granted, plaintiffs may claim that the "one motion rule" (*see* Fed. R. Civ. P. 12(g) & (h)) results in defendants' having waived other defenses that would otherwise be applicable to the amended complaint.)

With respect to the other pending motions, defendants' position is that any consideration of the manner or order of their disposition should await the Court's ruling on the legislative motions (nos. 10 & 11).

Respectfully submitted,

Sherman Marek
LAW OFFICE OF
SHERMAN MAREK, P.C.
1120 North LaSalle Drive, #19F
Chicago, Illinois 60610
Telephone: (312) 440-0244
Facsimile: (312) 873-3866

On behalf of plaintiffs

June 1, 2004

/s/ James R. Atwood
James R. Atwood
(D.C. Bar No. 079996)
Derek Ludwin
(D.C. Bar No. 474262)
COVINGTON & BURLING
1201 Pennsylvania
Avenue, N.W.
Washington, DC 20004
Phone: (202) 662-6000
Fax: (202) 662-6291

On behalf of defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 1st of June, 2004, a copy of the foregoing was served on counsel of record pursuant to the Court's ECF system.

/s/ Derek Ludwin
Derek Ludwin